In the

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 685

PETE MAHONEY,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN

Brief Opposing Petition for Certiorari

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I

Opinions of Court Below.[*]

The opinion of the court below is officially reported as *People v. Fleisher, et al.* (including Mahoney), 322 Mich. (adv. sheets, Nov. 9, 1948) 474, unofficially, 34 N.W. 2d 15. The connected case referred to in the opinion and in counsel's brief, p. 17, is officially reported as People v. Chivas, 322 Mich. 384, and unofficially in 34 N.W. 2d 22.

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[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed record.

II

Counter-Statement on Jurisdiction.

We accept the statement, petition, p. 15, that jurisdiction of this Court is invoked under 28 U.S.C., Revised, § 1257, and that all necessary steps were taken within the time provided by law.

It is our position, however, (1) that certain questions presented to the Court in the petition, and in the brief of the petitioner, were not presented in their federal aspect; (2) that the court below decided no federal questions, substantial or otherwise; (3) that the court below rested decision on adequate and independent non-federal grounds; and (4) that no federal question presented by the petition for certiorari, possesses substance.

III

Counter-Statement of the Case

Since petitioner's statement of the case is, in our opinion, argumentative, relating the facts most favorable to him, we cannot accept such a summary of the 3-volume printed record. We, therefore, supply the following abstract of the testimony, taken from our brief in the court below.[1]

Such abstract of the testimony includes: (1) a broad outline of the State's theory of the facts, derived from the

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[1] It should be noted that none of the defendants moved for a directed verdict, and none contended that the verdict of the jury was against the great weight of the evidence.

trial court's charge to the jury; (2) a brief synopsis of the testimony which the people contends supports such a theory;[2] (3) the theory of the defense which was, of course, rejected by the jury; and (4) a short summary of the testimony offered in support of the defense theory.

1

The People's theory, accepted by jury in resolving issues of fact.

As carefully explained by the trial judge in his charge to the jury when stating (996-1001) the theory of the prosecution, the essential ingredients of the story accepted by the jury are substantially these:[2]

The defendants Fleisher, Selik and Mahoney were concerned in procuring an interest in the gambling establishment at 69½ South Saginaw Street in the city of Pontiac which was conducted by one James Dades (150-167) as the Club Aristocrat, and which they proposed to acquire through the procedure dubbed by the underworld as 'muscling in' and in furtherance of such a scheme Fleisher and Selik had conceived the plan of robbing the proprietor and owner (996).

Mike Selik, who worked in O'Larry's Bar in Detroit, had while in state prison become acquainted with Sam Abramowitz, a witness in this case,[3] and after their release Selik

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[2] In such summary (and those which follow) we shall endeavor to eliminate all unessential details.

[3] For his testimony, see record (346-371; 378-457; 470-512; 539-546).

and Abramowitz (the witness), the defendants Fleisher and Mahoney, and another witness, Henry Luks,[4] met on several occasions in O'Larry's Bar (996).

Luks, who was a state prisoner on parole, worked in Lansing; Abramowitz, also on parole, lived in Flint; but each of them, from time to time, would frequent O'Larry's Bar, in Detroit, where they met the defendants Fleisher, Selik and Mahoney (997).

During the latter part of November 1944, Selik requested Luks to come to Detroit because he had something for him to do, and on or about the 28th of that month Selik wired Abramowitz at Flint, requesting him to come to Detroit on Friday (Dec. 1, 1944), stating that it was important (997).[5]

On Friday, December 1, 1944, Abramowitz met Fleisher and Selik at O'Larry's Bar, Detroit, where they informed him they wished him to participate with them and others in the robbery of a place in Pontiac; and these three men, Selik, Fleisher and Abramowitz then drove to a cardroom operated by Mahoney on Woodward avenue near the Vernor Highway, where they met Luks, Mahoney, and the defendants Chivas and Davidson. And it was then and there agreed between them (Fleisher, Selik, Mahoney, Davidson and Chivas, defendants, and Abramowitz and Luks, witnesses and accomplices) that the parties would drive to Pontitc that night for the purpose of robbing the place discussed and agreed upon (997).

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[4]

See Luks' testimony (167-235).

[5]

For brevity in this summary of the State's theory, we use the last names of the parties concerned.

Pursuant to such agreement, the parties drove to O'Larry's Bar, picked up the gun or guns, and in two automobiles proceeded to Pontiac, arriving there in the early hours of Saturday, December 2, 1944, when the defendant Chivas went into Dade's place and in a few minutes reported to certain of the other defendants concerning the amount of 'play' going on in the gambling establishment (998).

In accordance with an understanding between the parties to the transaction, certain of them synchronized their watches, it being agreed that Chivas was to return to the Dades establishment, wait exactly 5 minutes, and then leave the place, whereupon Davidson, Abramowitz and Luks would gain entrance and rob the individuals who were playing cards or gambling (998).

Meanwhile, Abramowitz obtained three guns from the defendant Mahoney, who had brought them from Detroit, and who was parked across the street from the gambling establishment, gave one to Luks and one to Davidson, (987, 998).

Later, Luks, Abramowitz and Davidson went to the front door of the Dades place, rang the bell, but were not allowed to enter. Davidson was recognized by one James Pruzor (285-316), who told the rest of the occupants not to let the men in; so, after a short time Abramowitz, Luks and Davidson left, going down the stairway leading to the street. One of the Dades' place frequenters, thinking he recognized some of the parties, left the establishment (998), and went down to the sidewalk in front of the stairway, where he was struck over the head with a gun by Davidson.[6] Whereupon,

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[6]

The man so assaulted was Philip Criss who testified (236-249) concerning the affray, but who recognized only the defendant Chivas. Other witnesses, esp., Abramowitz and Luks, testified concerning the remaining details.

Luks and Davidson marched the witness Criss up the stairway, and one of the occupants opened the door, allowing Luks and Criss to enter, but they shut it before Davidson got in. Luks, gun in hand, then informed the occupants that it was a 'holdup' and he proceeded to rob certain of them of their money, taking upwards of $270 from the proprietor, James Dades (999).

Shortly after the entrance of Luks and Criss into the gambling establishment Abramowitz, who in the interval had attended the outside door, returned upstairs, found Davidson in the hallway in front of the upper door, and with his gun broke the door glass, thus permitting Davidson to enter the place and who while armed with a revolver participated in the robbery (999).

In breaking the glass, Abramowitz cut both his wrists and, bleeding freely, ran downstairs and got in the rear seat of an automobile (belonging to one Martin Eisner) which had been driven to Pontiac by Fleisher and in which he and Selik were then seated. Abramowitz remained in this car long enough to leave blood stains on the floor of the rear seat of the vehicle, and Fleisher and Selik told him to go to Pete's (Mahoney's) car so Mahoney could take him to a doctor. Accepting such advice, Abramowitz got in the car with Mahoney and they started for a doctor (999).

Unable to find a physician in Pontiac, and while driving to Detroit, Mahoney and Abramowitz decided to go to Harper Hospital in that city, concocting the story (to be told hospital authorities) that Abramowitz had been injured when attacked by some colored people. Upon arrival at the hospital, Abramowitz told his story and was treated by a physician who took several stitches in his wrists, the scars of which he bore when he testified (1000).

Fleisher, Selik, Davidson (defendants) and Luks (the witness) left Pontiac shortly after the robbery, drove to Fleisher's home, took care of the guns (with the exception of that used by Abramowitz), and then Selik and Davidson, accompanied by Luks, went from Fleisher's home to a restaurant on Dexter Bouevard where they counted the money taken in the robbery, and from there went to Greenfield's restaurant. While there, Selik phoned the defendant Mahoney at his apartment, and shortly thereafter Mahoney and Chivas came to Greenfield's (1000).

In dividing the money Davidson requested and received $150.00; and it was agreed that Chivas should have a like amount (1000-1001).

Selik and Mahoney then went to Harper Hospital and brought Abramowitz to Greenfield's restaurant where they remained a few minutes during which Abramowitz being weak drank a couple of glasses of milk. There the parties split up; Mike Selik took Abramowitz and Luks to his apartment, where Luks remained until the following day, Abramowitz staying until sometime the following Monday (1001).

Luks received approximately $170.00 as his share of the avails of the robbery, while Abramowitz received a similar amount (1001).

Luks and Abramowitz were called before the grand jury being conducted by Circuit Judge Doty in Oakland county, and each of them was granted immunity concerning their answers relating to the facts in this case (1001).[7]

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[7]

Code of Criminal Procedure, chap. 7, § 6; 3 Comp. Laws 1929, § 17220; Stat. Ann. § 28.946.

2

Synopsis of testimony supporting theory of people accepted by the jury.

Witnesses for the prosecution fall readily into three groups: (a) those accomplices who related the entire transaction from its instigation to its close;[8] (b) those who corroborated the testimony of such accomplices;[9] and (c) those 'eye-witnesses' who were present at the Club Aristocrat when the event occurred.[10]

(a) Testimony of Accomplices:

Henry Luks, a 29-year-old recidivist, after relating his antecedents (167-168), first told of his friendship and association with Selik and his acquaintance with the other defendants, Fleisher, Mahoney, Chivas and Davidson, the group that frequented O'Larry's Bar and Mahoney's place on Woodward avenue (168-170).

He testified in substance (169-189) that the last part of November or the first part of December 1944, on a Friday, in response to a telephone call from Selik, he went from Lansing to Detroit by rail, and arrived at Mahoney's place on

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[8]
Henry Luks (167-235); Sam Abramowitz (346-371; 378-457; 539-546).

[9]
Martin Eisner (316-329); Abe Messenger (329-331); Gabriel Cohen (331-339); and Joseph A. Lutz (339-342).

[10]
James Dades (150-167); Philip Criss (236-249); Chris Kocotas (250-261); Harry Polenis (261-270); Louis Armos (270-175); George Glotopolos (275-284); and James Prunor (285-316).

Woodward avenue between 10:00 and 11:00 at night, where, at midnight, he had a conference with Mahoney, Selik, Fleisher, Abramowitz, and Davidson; Chivas was there, though he did not sit at the table and had little to say.

At this conference, the parties laid their plans and agreed to go to Pontiac for the purpose of 'sticking up' some 'gambling house'. They were to go there in two cars; Mahoney was supposed (175) 'to drive the guns down there, and (said the witness) we were supposed to meet him . . . and get the guns and go up and hold up the place and come down, and Harry (Fliesher) and Mike (Selik) were supposed to drive us back to Detroit. I was supposed to go in with one of the guns, and Candy (Davidson) and . . . Abramowitz was also supposed to go in with me. . . . Abramowitz was supposed to stay at the door'. Chivas was supposed to 'leave (let) us in the place'. And Luks revealed further details of the plan, many of which are irrelevant to this review.

He did testify (176), however, that:

> "While we sat there at the table in Pete Mahoney's place, there was something said concerning what car we were to ride up here in. We were to follow in another car, and I did not know at that time what kind of a car it was, and later learned it was a Pontiac and Harry Fleisher was to drive it. It was said that . . . Selik, . . . Abramowitz, the fellow Candy (Davidson) and myself would ride in that car with . . . Fleisher driving . . . ."

After the foregoing conversation, the defendants went to O'Larry's Bar, where they remained until it closed at 2:00 o'clock in the morning (177), when Fleisher, Selik, Davidson (referred to repeatedly as 'Candy'), Abramowitz and

the witness Luks drove to Pontiac and passed the place they were to hold up (177). They then made a U-turn about a half block beyond, and finally parked on the same street on the opposite side across from the place they held up (177-178). Mahoney's car was parked across from them 'about 30 feet going in the opposite direction', and the defendant Chivas came from there to talk with them, sitting in the front seat.

Chivas stated (178) he had been up in the gambling place and, since they had a poor night, there wouldn't be too much money. Fleisher didn't like the idea; Luks favored it; and both Selik and Fleisher said 'it is up to you fellows'; and thereupon those who had watches 'fixed them at the exact time'. The plan was that Chivas was to go up in the gambling place, remain there three or four or five minutes, and when he came out the door, the others were to force their way in and hold up the place (179). There was a doorman there who would not let them in if they were strangers.

This witness (Luks) then proceeded to give the details of the holdup, as heretofore summarized: that Chivas left the car and went across the street; that Abramowitz, Luks and Davidson waited a few minutes, then crossed the street and obtained three guns from Mahoney's car, each receiving one; that Luks, Abramowitz and Davidson went up the stairs, were denied admittance, and (179-180); that Luks finally obtained entrance to the gambling place by sticking his gun in the ribs of a man who had just come out; and that the robbery then proceeded (180).

Shortly after, Luks heard a crash of glass, and Davidson (referred to as 'Candy') entered the place with drawn gun. They stayed about 10 minutes, obtaining money from the people there and from the cash register. During this time,

while they were in the place, Chivas was amongst the customers, holding his hands up and, upon demand of Davidson, lying face down on the floor; and he was still there when Luks walked out the door (182).

When, after the robbery, Luks and Davidson went out and down the stairs, they crossed over to the Pontiac car where they found Selik and Fleisher, and they got into the back seat (181-182), and Selik told them to be careful, that Abramowitz had been seriously cut about the wrists, and that there was blood on the floor (183), but Luks did not observe the blood because it was still dark.

They did not stop until they got to Detroit and Fleisher's home, where they were supposed to leave the guns, and Fleisher left the car; Luks did not see him take the guns, but the witness had handed the guns to the front of the car while they were driving from Pontiac to Detroit. Fleisher returned to the vehicle in a few minutes (183), and they drove either to a cab or directly in the car to a restaurant on Dexter Avenue not very far from O'Larry's Bar. The witness was not sure whether Fleisher drove them, or took them to a cab in which they were conveyed to the restaurant. Be that as it may, 'Candy' (Davidson), Selik and the witness Luks went into the restaurant and, during the half hour they were there, the latter got the money together and counted it, about $800. (184).

After that, these men took a cab to the Greenfield restaurant on Woodward Avenue, and Davidson, Selik and Luks went in 'because (Luks said) we were to meet the other fellows there' (184).

Mahoney and Chivas came to this restaurant later, and there were five of them, Selik, Davidson, Mahoney, Chivas and the witness Luks (185). Then they proceeded to divide

the money: Davidson asked for and received $150, and, after Selik and Mahoney had gone to the hospital and brought back Abramowitz, Chivas was given $150 (185) on order from Mahoney and Selik; and Abramowitz received $170 or $180 (186).

When Abramowitz came into the restaurant with Mahoney and Selik, his arms were bandaged (186). Luks was not sure whether he gave Abramowitz the full sum of $170 or $180 there; it might have been some there, the rest somewhere else (187).

From the Greenfield restaurant, Abramowitz, Selik and Luks went to Selik's apartment and went to bed after staying up a little while and having a drink or two. Luks slept on a couch and Abramowitz slept in a Murphy bed (187). He stayed there until the afternoon of the next day and Abramowitz was still there when he left; he saw him again that night. Selik's wife was around there, and that night was the last the witness saw Abramowitz around the Selik apartment. Then Luks returned to Lansing (188).

Luks testified (188-189) further that prior to the robbery, either at the place on Woodward or in the car, Selik told him that 'the fellow (Dades) had an expensive diamond ring on his finger".

The witness Luks was closely cross-examined by counsel for the defense,[11] especially in relation to the make of car in which he had been driven to the scene of the crime (209, 212-214), and he was called upon to explain certain alleged

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[11]

By counsel for Mahoney (189-193; 225-227), Chivas (193-199), Davidson (200-201), and by the attorney who represented Fleisher and Selik (201-225).

discrepancies in the testimony given by him at the preliminary examination.

Sam Abramowitz (346-371; 378-457; 539-546), 37 years old, a native of Cincinnati but a resident of Detroit since age one, had a 10th grade education, and possessed a prison record (346).

The witness met the defendant **Selik** about 1931 or 1932 while they were imprisoned at Ionia, and they became pretty good friends, renewing their acquaintance in 1944 within a month or so after Selik had been released from Jackson prison (346-347). It might have been the latter part of 1943 when they met at O'Larry's Bar, which Selik was running or managing (347).

From April 1943, when Abramowitz was released on parole and went to live in Flint, until the 2nd day of December 1944, he saw Selik a few dozen times or more, at O'Larry's Bar, at Selik's apartment, and in a little gambling place on 12th Street, Detroit (348).

Abramowitz testified (348-349) he had known **Fleisher** for 20 years, during which they grew up in the same neighborhood, though he did not know him well (other than to say 'hello') until the year 1944 when he saw Fleisher about the same amount of time he saw Selik and at the same places. He really got acquainted with him in October of 1944, and, he stated (349), 'I became better acquainted with him when this robbery happened'.

At about the same time, in October 1944, the witness also became acquainted with the respondent **Mahoney**, and he met the defendant **Chivas** at Mahoney's place on Woodward avenue. He knew Davidson by the name of 'Candy' (349).

During the period of time when Abramowitz lived in Flint, he received a telegram from Selik and shortly after that he arrived in Detroit on Friday night, December 1, (1944), and went to O'Larry's Bar (350) about 10:00 o'clock. Fleisher and Selik came in about 11:00 o'clock and, during a conversation with this witness, stated they wanted him to go to Mahoney's place (351).

When (the three) were outside, said the witness (351),

> "Mike (Selik) spoke up and told me that we could take this Pontiac place off that night or rather . . . the following morning".

No other conversation took place between O'Larry's Bar and Mahoney's place, because when they left they were in Marty Eisner's car 'and Mike's (Selik) wife was along and we didn't talk in front of her' (351). They were trying to catch a cab first and since they could not get one, Selik suggested they go inside and get Eisner's car and get his (Selik's) wife and after they got to Mahoney's place, Mrs. Selik would drive back with the car (351).

At Mahoney's place, Abramowitz met Chivas, Luks and Mahoney, as well as Candy Davidson, who arrived 20 or 30 minutes later in response to a telephone call and who was introduced to them as an out-of-town boy (352-353).

This witness then testified in relation to the conversation had by the defendants and the witnesses around a table in the Mahoney establishment during which they formulated plans for robbing the gambling place at Pontiac (355-358), and he told of further conferences on the subject held later in the morning at O'Larry's Bar. During such talk, Selik said (351) that he and Fleisher and Mahoney wanted

"to get a piece of the place (at Pontiac) and take it over. We were (said Abramowitz) going to hold up the place and what money was there we would keep, they (Selik, Fleisher and Mahoney) didn't want any part of the money, they just wanted the place".

Like Luks, Abramowitz also told of the trip the parties made to Pontiac in the Eisner car, starting out from O'Larry's Bar around 2:30 in the morning of December 2, 1944, and how Fleisher drove with Selik who sat in front beside him while Davidson, Luks and Abramowitz occupied the rear reat. He did not see Chivas and Mahoney again until they arrived in Pontiac (358-359).

And he testified in detail concerning the robbery and the part he played (359-364), including the cuts he received on his wrists while opening the door into the gambling place (362-363).

Abramowitz related how, after cutting his wrists on the glass of the upper door, he returned downstairs to the Eisner car and got in the rear seat and talked with Fleisher and Selik who still sat in front. While there, he bled profusely on the front of the back seat and possibly some on the back of the front seat, because he was leaning up that way and telling them to take him to a doctor. Selik, however, told him to run ahead to Mahoney's car and have him take him to a doctor, and they, Fleisher and Selik, could wait and take the boys back (363). And the witness displayed to the jury the scars on his wrists (363-364).

When Abramowitz got into Mahoney's car, they decided to drive to one of the hospitals in Detroit, and as they drove along they determined on Harper Hospital in that city (364), and planned the story they would tell, having in mind that in every emergency case that comes into Detroit

hospitals, the police are called (365). Knowing that on one side of Harper Hospital was a colored neighborhood, they decided that Abramowitz would go in that entrance and tell the authorities in charge that he had been cut by a couple of colored men that were trying to rob him. And that is the story that he told when he got inside (365-366).

After being treated in the emergency and operating rooms by Dr. Anderson and others, Abramowitz, when he got downstairs, saw Selik and Mahoney standing near the cashier, paying his bill. The three men then got a cab and went up Woodward avenue to Greenfield's cafeteria where they found Chivas and Luks. Candy (Davidson) was not there, and Selik told Abramowitz that Candy had taken his part of the money and gone (366). As they got to Greenfield's restaurant, Selik, Mahoney and Chivas were there with Luks, but Fleisher was not present. The men were sitting at a table when he arrived, and one time Selik said to him that he had his (Abramowitz's) share of the money and he would give it to him. Abramowitz said O.K., and he didn't take the money until the next day (367). He had two glasses of milk, and then they split up.

While at Greenfield's, the conversation was that Abramowitz was going to Selik's apartment and stay there for a day or two, 'which was suggested by Mike Selik' (367).

In accordance with that arrangement, Selik and Luks, Abramowitz and Mahoney left the restaurant in a taxi cab; they let Mahoney off at the corner of Woodward and Alexandria, and then went to Selik's apartment on Boston Boulevard (consisting of a bedroom, living room, kitchen and bathroom). Luks, Selik and Abramowitz went in together, and the witness slept on the Murphy bed, while Luks slept on the couch (367).

Abramowitz was not certain of the time of arrival at Selik's apartment, but he thought it was around 6:00 o'clock in the morning. He first saw Selik's wife around there when he came in (367).

The witness also testified (369) he remained in the Selik apartment from Saturday morning until about noon Monday. Selik's wife and a girl from Chuck Selik's bar took care of him and looked after him. Luks stayed there that one night and left some time during Saturday.[12]

Abramowitz recalled (369) a man named Eisner coming to the Selik apartment Saturday or Sunday, he thought Saturday, and asked him how he felt; and 'there was a fellow in the kitchen they call Lindy'. He had known him for years but did not know until he saw it in the papers, that Lindy's last name was Niskar. Niskar was there all afternoon, taking bets on a telephone extension which they had there for a bookie. Abramowitz had seen him around the apartment before doing the same thing. Eisner went into the kitchen and talked with Lindy Niskar (369-370), but he didn't know what they were saying.

Abramowitz finally left Monday night and returned to Flint, and was eventually picked up by the police in March 1945 and taken to the jail at Mason in Ingham county (370) where he was kept until the trial (371).

Recalled, the witness testified (378) that on or about the 28th day of November 1944, while he was at Flint, he

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[12]

It is important to compare this testimony with that of Selik (779), and both with the allegations in the affidavit of Mrs. Selik (1066-1067) which was filed in support of the motion for new trial on behalf of Fleisher and Selik.

received a telegram signed 'Mike' (Selik) which told him (383) it was very important for (Selik) to see him Friday night, and it said (384) to come to Detroit Friday night.

The witness was then cross-examined by counsel for Chivas (384-396) and Davidson (396-397).[13]

On cross-examination by counsel for Mahoney (396-408, Vol. I), Abramowitz testified it was around 12:00 midnight when the defendants left O'Larry's Bar, Detroit, so they must have been in that place two hours (398). During that time he talked with Selik and Fleisher about 10 or 15 minutes (399).

On cross-examination by Mahoney's counsel (396-408, Vol. I), Abramowitz testified it was around midnight or a few minutes after that they left O'Larry's Bar to go to Mahoney's place, Detroit, so they must have been in the former place two hours (398) during which he talked with Fleisher and Selik about 10 or 15 minutes (399). While waiting for a cab, Abramowitz had a conversation with Selik, as the result of which Mike Selik and his wife, Fleisher and Abramowitz drove to Mahoney's place.

Counsel questioned the witness closely concerning Mahoney's participation in the conference at the table in his place, bringing out the fact that Mahoney spent most of his time attending to his gambling business and selling whiskey (400); Mahoney merely came to that table for a minute or so on a couple of occasions, 'up until the last time'. They did not really discuss the proposed robbery until they were

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[13]
Since Chivas appealed on a separate record, and since we received no brief from counsel for Davidson, such cross-examination is not set forth in full.

all there, except Chivas, then they sat there about 10 minutes talking about it. 'I mean', he said, 'Pete Mahoney sat at that table about 10 minutes, and that constituted our discussion regarding the whole matter, and how it was to be pulled' (401).

Pete Mahoney had a red two-door Oldsmobile coach (401) which he drove to Pontiac later that following morning (402).

Seven of them drove in the same car from Mahoney's place to O'Larry's Bar at 1:30 in the morning. Henry Luks was one of the seven men (402), though if Luks stated there were five men in one car and two in another, either witness could be mistaken (402-403). But he was pretty certain there were seven since he thought he sat on somebody's lap.

Abramowitz's acquaintance with Mahoney began around October 1944 and in the interval between then and the 1st day of December they merely 'passed the time of day' several times when they met casually (403).

When they arrived in Pontiac, the witness was certain, that second car was parked on the west side of the street when Abramowitz went to it to get guns. Then he went immediately across the street. And immediately after he broke the glass in the door, he came downstairs right away (404-405). He did not know how much time elapsed but he thought about 12 minutes. He got in the car and was there just a few seconds. The bad cut on the inside of his wrist was bleeding very badly (405).

Abramowitz stated he then got out and went up ahead and got into Mahoney's car which had been pulled up in front on the same side of the street while he was upstairs. He

could not estimate the distance it was from the building entrance, might have been 100 or 500 or 1,000 feet (406).

When he got in Mahoney's car he stated to him his wrists were bleeding, and they bled all the way to the hospital, so the blood went down on the car, either on the front seat or in the front of the car and all through his clothes (406).

And counsel for Mahoney further examined the witness on the subject of his trip to the hospital (406-408), and in relation to his criminal record.

Cross-examined by counsel for Fleisher-Selik. (Vol. II. 409-451), Abramowitz testified (409-413) that although he had stated at the preliminary examination conducted by Circuit Judge Doty in the same court room, that an attorney, Theodore J. Rodgers, had swindled him out of $500, the accusation was false because, his recollection having been refreshed after being questioned by Lyle Morse, a state police officer, he remembered that the lawyer's name was Robbins, and not Rodgers.

He was also closely examined on the subject of his parole in 1943 (414-415), the terms thereof and the consequences flowing from its violation (449) and the penalty exacted by law for the offense of robbery, armed (450).

He admitted he had had opportunity to talk with the witness Luks about his testimony, but he denied that he had (417).

Abramowitz also admitted (417-420) he had been taken to Dades' place at Pontiac to check-up on the place, and counsel questioned him closely on a discrepency in his testimony with respect to the number of doors there, whether 3 or 4.

The witness denied (420-421) he knew Polenis (an eye-witness, see 261-270 and 547-550); it was possible he answered (421), that since his arrest in March 1945 Harry Polenis had been brought to his presence by an officer who said 'This is Harry Polenis, do you know him', but he did not recall the event. His memory was not good.

Under such examination, he retraced the course of events on Dec. 1 and 2, 1944, the use of Eisner's car (422), and his knowledge of Hyman Niskar, who, he said, was in O'Larry's Bar that night. He restated facts relating to the plans laid for the robbery (423-425) and the methods pursued in carrying them out (426-427).

He also explained the duties of a door-man during a robbery (428), the position to which he was assigned that night (429), and he again stated that Fleisher, Selik and Mahoney were waiting in cars out in front (429).

The witness was closely questioned about a car he saw or heard on the street below while he was on the stairs (430-433).

Counsel then examined the witness about the arrangement made by the defendants that night at Mahoney's place, about splitting the expected $15,000 or $30,000 they hoped to realize from the robbery, and he testified that Fleisher, Selik and Mahoney did not want any share, the reason being that they were 'trying to muscle in on the place' (434-437).

The witness again related the events which occurred after cutting his hand and wrists on the door of the Dades' place (441-442), the trip to the Detroit hospital; and in that connection he was asked to explain why he and Mahoney, although anxious to obtain medical attention, did

not stop at other hospitals along the route, the answer being that they did not wish to risk investigation in Oakland county or in Highland Park (441-444).

At the Harper hospital, two police officers questioned Abramowitz, who told them the story he had concocted with Mahoney (445).

When he came out he was surprised to find Mahoney and Selik waiting for him; he didn't find Luks there but saw him later when the three men drove to Greenfield's restaurant.

And counsel examined the witness regarding the trip to Selik's home and his stay there (447-448).

On re-direct examination (451-454), Abramowitz testified (451) that after he had received the injury, Selik agreed that he would be paid $10 a day until he was able to go back to work. Thereafter he received from Selik, Fleisher and Mahoney sums of money amounting to $300 or $400 altogether (452).

The witness testified he knew of the proposed hold-up job prior to receipt of the telegram from Selik (452), learning of it two or three weeks earlier at O'Larry's Bar when Selik told him he had a place in Pontiac and that just as soon as it was set up right Henry (Luks) and Abramowitz were going to pull it (453).

The conversation about Fleisher, Selik and Mahoney 'muscling in' took place first in front of O'Larry's Bar, and second at Mahoney's place (453).

Further cross-examination (470-489): After the State had rested (467), Abramowitz was recalled and cross-examined

further by counsel for Fleisher and Selik, first (473-474), in regard to a statement that the witness made to the prosecuting attorney of Jackson county,[14] and second (475-483), concerning the gambler Hyman Niskar.[15]

And he was also questioned (484-489) concerning certain events which followed his arrest in March 1945.

(b) Corroborative Testimony:

Luks and Abramowitz were corroborated in the manner following (stated here in summary fashion):

Martin Eisner (316-329), owner of the car said to have been loaned to Niskar the night of December 1, 1944, and which Luks and Abramowitz said was used in connection with the robbery, testified that the car was returned to him the following morning, Dec. 2, 1944, and that he found blood stains on its floor.

Abe Messenger (329-331), a lawyer, testified he represented Eisner in a cause pending in the district court of the United States at Detroit, and though he could not remember the exact or many of the exact details (he was a reluctant witness, obviously), he did recall that on one occasion Eisner picked up another attorney and himself

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[14]

The admissibility in evidence of this statement is involved in Question 11, Fleisher-Selik brief, pp. 45-53. See Group IV, Question 2, this brief. We regret the necessity for breaking the numerical sequence of the footnotes, skipping from footnote 48 to this, footnote 52.

[15]

Involved in questions set forth under Group IV, this brief, based on court's refusal to compel State to endorse Niskar's name.

to take them downtown; and that on this particular occasion he heard someone, when getting out of the car, making the remark: (Who the hell had a miscarriage here', but he did not himself see any stains (330).

Gabriel Cohen, the other lawyer, testified (331-339), with the characteristic caution of a member of his profession, that on the occasion mentioned in Mr. Messenger's testimony, *supra*, that something was there on the floor of the car finally caused him to use the expression above recorded (338-339).

Joseph A. Lutz (339-342), an orderly in Harper Hospital, testified he remembered that on the morning of December 2, 1944, a man by the name of Abramowitz was brought into the hospital, and he identified him as the defendant by that name. He saw Dr. Walter Anderson sew up the arm of Abramowitz. This was between 3:00 and 4:00 in the morning, though it might have been later; and he also saw Selik and Mahoney there (341).

Doctor Donald A. Anderson (457-469), on night duty as an interne in Harper Hospital on December 2, 1944, testified concerning the condition in which he found the respondent Abramowitz when he came to the hospital that morning; and he related the treatment administered when he sewed up the wounds on the patient's wrists. Abramowitz, he testified (459-460), stated he had been taken into a car and a robbery was attempted by two colored men and that he became excited and fought his way free, and he received these cuts, whether they were from knives or glass, he wasn't sure. He left the hospital at 6:20 a.m. (460).

(c) Witnesses at scene of crime:

Several witnesses who were present in the Dades gambling establishment during the night and morning of Dec. 1st and 2nd, 1944, were called by the prosecuting attorney as 'eye-witnesses':

James Dades (150-167), proprietor of the Club Aristocrat at 69½ South Saginaw, in the city of Pontiac, testified he had previously been acquainted with Mahoney, Chivas, Fleisher, and Mike Selik, and he told of their visit to his club rooms a few weeks before the crime was committed. On that occasion, he said (153-155), these men asked him for a contribution for a brother of Fleisher to aid him in his appeal from a criminal conviction. He offered them $500 cash and a diamond ring, but the offer was rejected.

And he gave his version of how the robbery was perpetrated, though he was somewhat hazy on the matter of identification (155-167).

Philip Criss (236-249), a patron of the Dades establishment, recalled the occasion, though he did not remember the precise date; and he recounted how the robbery took place, but he recognized only the respondent Chivas as being present.

Chris Kocotas (250-261) was an employee in the Dades' Club Aristocrat (250). He told of the events of that night; he identified Luks (251), was not exactly sure of Abramowicz (252), was certain he saw Chivas (252 et seq.), and he told of the defendants' previous visit to the club (253). Recalled (625-627) as a witness for Davidson, he said he never saw the man any place in his life; and he testified he was on the floor when the three men came in.

Henry Polenis (261-270), a hanger-on about the Dades' Club, a man with a criminal record, was present there the night of Dec. 1-2, 1944, and at 3:00 a.m. He saw Chivas, but not the others (266).[16]

Louis Armos (270-275), an occasional visitor at Dades' Club, testified he was there about 1:30 a.m. December 1, 1944 (270), and he told of Chivas' connection with the matter (271-272) but he failed to recognize Luks (272).

George Giotopoulas (275-284), a bartender at the Lion Cafe, who gambled at Dades' place, was there the fore part of December 1944; he identified Luks as one of the robbers, and he told of Chivas' connection with the transaction.

James Pruzor (285-316) testified he came to Pontiac from Detroit in 1936. Present in the Dades place the morning of December 3, 1944, from 3:00 o'clock on, he witnessed the robbery which occurred about 3:30 a.m., he identified Chivas and told of his connection with the affair, and he recognized Luks and 'Candy' Davidson (285-290). He was cross-examined on his antecedents (291-295), on his memory, concerning previous meetings with Davidson (296-297), and in regard to his previous record (299-305).

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[16]

This was the witness who, with canny foresight, saved his $1400 by hiding in the toilet and locking himself in.

3

Theory of defendants, as explained in court's charge to jury (993-1023):

Harry Fleisher:

As explained by the court when instructing the jury (1003-1004), the theory of defendant Fleisher, based on his plea of not guilty and testimony adduced in his behalf, was that he first met the defendant Selik and became his friend in the early part of 1944; that for two years last past he had been a very close friend of Mahoney; that he first met Abramowitz and Luks in the fall of 1944; and that his acquaintance with Chivas was only casual.

Although he had been engaged in bootlegging during the prohibition era (1916-1932), although after repeal he continued illegally to distill alcohol, and although he had gambled, he was not a robber or a man who attempted to 'muscle in' on anyone. And he had at no time or place entered into any unlawful agreement with Abramowitz and Luks to commit a robbery in the city of Pontiac.

Fleisher also denied he had anything to do with the crime charge in the information, and he claimed the matter was first called to his attention after his arrest in connection with the Hooper murder case on April 20, 1945.

He admitted he had heard of Abramowitz being hurt, but he said he had no occasion to remember particularly his whereabouts on the night of December 1 or the early morning of December 2, 1944, especially after the passage of some five months or more; and that usually on Friday nights he was at home for his family dinner.

Fleisher made no claim, however, that he positively remembered that night or his exact whereabouts, and he stated that that was reasonable considering the fact that nothing occurred on that night, as far as he was concerned, which would cause him to remember it any more than any other Friday or Saturday night, except that was his best recollection that he learned of Sam Abramowitz being inured on Saturday, December 2nd, 1944, but he had no idea or knowledge that his injury occurred by reason of any unlawful act.

This defendant further claimed that even though he were engaged in the gambling business with Mahoney for the past two years, such association was merely that of a friend and gambler, and he was not guilty of the charge made against him.

Myron Selik:

It was the claim of defendant Selik (1004-1007) that he was not guilty of the charge against him; and that he at no time or place entered into an unlawful agreement to commit the crime charged in the information.

He admitted several convictions of felony and misdemeanor, but urged he had paid the full penalty for robbery, armed, and unlawfully driving away an automobile without intent of steal.

After his release from prison on December 3rd, 1943, he was employed by his brother Charles in his saloon at Dexter and Boston boulevards, Detroit, until his arrest on April 20, 1945.

On August 24, 1944, he married his wife and was still living with her.

He admitted that he had, in his free hours, three or four days a week, gambled in a club on 12th street, but he contended that by this fact he could not now be condemned.

He also admitted that he was, on July 31, 1945, convicted of the crime of conspiracy to kill and murder Warren G. Hooper, from which conviction he had appealed.

Selik denied he ever had any agreement with Luks and Abramowitz, or anyone else, to have Luks and Abramowitz and others commit the hold-up in this case, and he denied any participation in or knowledge thereof, professing that his only connection with the case was when he was called by Luks at an early hour on the morning of Saturday, Dec. 2, and advised by Luks that Abramowitz was hurt and in Harper hospital and needed help.

Thereupon, he claimed, he told Luks to meet him in Greenfield's restaurant; and that, after dressing, he immediately proceeded there and met Luks, who informed him that Abramowitz was in the hospital by reason of some altercation with negroes.

He testified that he thereupon called the Harper hospital and was informed, upon his inquiry, that within a short time Abramowitz would be able to be removed from that institution; that he called his personal physician and Pete Mahoney, informing the latter of the circumstances and requesting him to get a room in the Strathmore hotel where the injured friend could be taken.

Shortly thereafter Mahoney appeared at the Greenfield restaurant, in company with him, Selik, without any knowledge whatever of the crime Luks and Abramowitz had committed, left Luks in the restaurant and went forth in a cab to Harper hospital, a short distance away. After a short

wait, Abramowitz came out of the elevator, the fee due was paid for service rendered him, and a tip was given to the orderly, Lutz.

Abramowitz was apparently in a weakened condition, his hands were bandaged; and Selik and Mahoney thereupon took Abramowitz to Greenfield's restaurant and attempted to aid him in regaining some strength by feeding him milk.

It became apparent to Selik (he claimed) that Abramowitz, by reason of his weakened condition, could not and should not be left alone in a hotel room; and he claimed that he took Abramowitz to his home and repaid in kind the treatment he received from Abramowitz when he himself was accidently injured in Chicago in 1936.

After Abramowitz was taken to Selik's apartment along with Luks, he was attended by Selik's wife, Naomi, until some time Monday (December 4th).

At no time while Abramowitz was in Selik's apartment did the latter have any knowledge that Abramowitz had received him injuries other than as Abramowitz had related to him; he claimed he had absolutely no knowledge that Abramowitz had participated in a robbery, or that he had on his person between $150 and $170, but admitted he gave Abramowitz $50 as a loan for medical expenses. And he claimed he most certainly would not have given him the money had he known Abramowitz had $150 or more in his pocket.

Pete Mahoney:

It was the claim of Pete Mahoney (1002-1003) that he was innocent of the crime charged against him and that he had no knowledge of, nor participation in the robbery of

the Aristocrat Club, and that the charge against him had not been established by the evidence.

Mahoney further claimed that, to the best of his knowledge, neither Luks nor Abramowitz were ever in his place at 2423 Woodward avenue, Detroit; that none of the defendants was there during the evening of December 1, 1944, and that he has never met with anyone or participated in any plans or discussions concerning the commission of any crime or violence on December 1, 1944, or on any other date.

It was his further claim that on the night of December 1, 1944, he was busy at his place of business on Woodward avenue, Detroit, until about 2:30 a.m. the following day, and he had not been away from there that night. He then went downstairs to the Hi-Wood restaurant and, after eating, proceeded to his residence at the Strathmore hotel where he retired and remained. And he claimed that he received a call from Mike Selik about 5:30 a.m., December 2, 1944.

And it was further the claim of Mahoney that he was not in Pontiac at any time after the visit to the Dades place on or about October 15, 1944, until he heard that a warrant had been issued in this cause.

William W. Davidson:

It was the claim of the respondent Davidson (1002) that he was not guilty of the crime charged against him, and that the evidence did not establish such guilt. He did not take the stand in his own behalf.

4

Testimony for Defense

In behalf of Fleisher-Selik:

Both Harry Fleisher (703-749) and Myron ('Mike') Selik (766-807) took the stand, each testifying in his own behalf to facts which, if believed, would sustain his theory as set forth in part '3', *ante*, and maintain his innocence. It need not be repeated here.

Other witnesses were called by their counsel and testified in substance as follows:

Joseph Marlow (695-703), a Detroit police patrolman assigned to the 13th precinct station on East Canfield between Woodward and John R., while on scout car duty the night of December 1-2, 1944, testified (695) that the district around Harper hospital, east of Woodward past John R Street and for over a mile or a mile-and-a-half east, and north and south for miles, is a solid colored district.

He testified (696-698) that early in the morning of December 2, 1944, he was called to Harper hospital where he saw Sam Abramowitz and investigated his injuries. Abramowitz told him he had been held up on Elliott street by a couple of colored fellows who came along and had attempted to rob him in the car; that a battle started and he broke the glass in the car and jumped out of the door of the car; and that he got his injury from the glass when he broke the door. The story sounded logical to him because of his experience in examining such people while investigating. 'You get to know when fellows are telling the truth and you can put things together and you can see whether he is lying or not' (608).

From his story, Abramowitz was walking on Elliott between John R and Brush which is a colored neighborhood. An occurrence of the kind reported by him is definitely not unusual. It happens very often down there.

On cross-examination, the witness testified (699-700) that Abramowitz told him the attempted robbery occurred at 4:15 a.m.; that Abramowitz also stated that during the fight with the colored men he was cut with a knife on his right and left arms (699), and that he could give no description of his assailants (700).

On re-direct and further cross-examination (701-703), the witness testified that if he had not believed Abramowitz the officers would have communicated with the detective bureau and there would have been further investigation. But because that type of thing happens in this particular district so frequently, he just concluded 'well' here is just another one of those cases' (701). It was very common and there was nothing unusual that caused him to suspect Abramowitz because he didn't know the name of the man who picked him up. He guessed it was a good story (702).

Orie Barry (750), an employee of the Greenfield restaurant, where the wounded Abramowitz was brought by his friends during the early morning hours of December 2, 1944, testified to the seating capacity of the restaurant, its schedule of service, and the number of people served that morning.

In behalf of Mahoney:

Pete Mahoney (534-538; 550-572; 576-617) testified at length in his own behalf in substantiation of the theory set forth in part '3', *ante*, and to facts which if believed by the jury would have led to his acquittal.

Other witnesses were examined, of course, and parts of their testimony (having little to do with the facts of the case itself) bearing on the whereabouts of Hyman Niskar, or in relation to other facts relevant to the questions involved, will be considered in argument.

In behalf of Davidson:

Davidson did not take the stand in his own behalf, but he added testimony in the nature of an alibi.

Olivia Ann Davidson (617-625), his wife, after reciting their antecedents (617-618), testified in substance that around October 1, 1944, they registered in the Strathmore hotel, Detroit, and stayed there one night; then they moved in with some friends and lived at 3703 14th street in that city.

During October, November and December 1944 her husband, the respondent Davidson was incapacitated with a left broken ankle, and was unable to walk around without the help of artificial means; he was on crutches quite a while and then used a cane; and he remained in that condition during those three months until they left Detroit in January, went to Toledo, stayed there two or three days, visited several other cities and arrived in California the first part of July 1945. They lived there under the name of Daniels (619).

She was in California when her husband was arrested. He did nothing to conceal himself; and in packing his clothes on numerous occasions she had never seen a pistol in his possession or belongings, nor had she ever seen him with a pistol.

On cross-examination (619-625) the witness was closely questioned in relation to her husband's gambling activities and their journeys about the country; and she admitted at its close (625) that Davidson had never done a day's work other than gambling 'because that is about the only thing he does'.

Dr. Simpson W. Green (627-631) testified to the effect that Davidson had visited his office on October 10, 1944; that he had an injury to his left ankle which was enormously swollen, and he carried a cane. The witness sent him to Dr. Blodgett for an X-ray but he never saw the plates.

Dr. William W. Blodgett (632-650) testified Davidson came to his office in the Kales building, Detroit, October 12, 1944; his left ankle was swollen and restricted in motion but in fairly good relation to the leg (633), and the witness proceeded to read from his notes describing its conditions

Davidson, he said, was to return in two days for re-strapping of the ankle, but he failed to do so and the doctor's office was unable to get in communication with him until recently.

X-rays were sent to the witness by technicians in Detroit, and they showed broken bones (637). Examination some two weeks before the witness testified, indicated healing of the angle (638).

Cross-examined (639-643), the witness-physician testified (643) that Davidson, if an average case, would be getting around by the 2nd of December.

On re-direct (644-649) **and re-cross** (649-650) he gave testimony to the effect that if the ankle did not receive proper treatment, as he instructed, 'the foot might continue to be

bad up until the present time, or indefinitely, whereas if the normal relation was restored, . . . them the foot in a reasonable time would function well again' (649). At present it was in good condition, indicating good treatment.

Dr. E. Walter Hall (650-662) testified as an X-ray specialist and answered numerous and lengthy hypothetical questions in relation to the conditions of Davidson's ankle.

Orris Leonard (662-669; 679-682) was a bartender who during October to December 1944 and through January 1945 worked at the Uptown Club, Detroit. He met the Davidsons at the home of his wife's mother, and he saw Davidson, who occupied a room there, every day during that period of time. And he drove Davidson around in his automobile (662-663).

Davidson used crutches about four weeks and thereafter used a cane. When the Davidson couple left Detroit in January 1945, his ankle, from outward appearances, was swollen and bandaged.

IV

Summary of the Argument.

Counsel raise five specific questions involving (1) the scope of cross-examinations, (2) the trial judge's interrogation in chambers, in the absence of the defendants or their counsel, and without their knowledge, of a member of the jury concerning a chance, out-of-court meeting during the progress of the trial between petitioners and the juror, (3) certain instruction to the jury in a supplemental charge, (4) alleged prejudicial remarks of the prosecuting attorney about a separate criminal prosecution, (5) further alleged

prejudicial statements of the prosecuting officer, and (6) petitioner claims that "the cumulative effect of many improprieties by the prosecution and/or trial court resulted in an unfair trial". Therefore, it is argued, the petitioner (in each instance and in the cumulative effect of such errors) was denied due process of law.

Our answer to each question is that in few of such episodes did the petitioner specially set up or claim any right or privilege under the Constitution of the United States (such claims when made were in the most general terms); that the challenged rulings upon evidence, remarks and instructions did not deprive the petitioner of a trial "according to the accepted course of legal proceedings" and that petitioner has failed to show convincingly, essential unfairness in this criminal trial. *Buchalter v. New York*, 319 U.S. 427.

V

The Argument

1

Alleged curtailing of cross-examination.

This question arose (226-227) during the re-cross examination of the people's witness Henry Luks, by counsel for petitioner.

Counsel for Mahoney directed Luks' attention to the fact that he (the witness) had stated the day before that the reason he went (from the train) to Mahoney's place was because it was the nearest place. Counsel then asked the

witness whether that morning he had told counsel for Fleisher-Selik that the reason he went there was because he thought it was the nearest place where he could contact Selik and the rest of the fellows.

"**Mr. Sigler**: Now, if the court please, I submit that is improper. *It is so trivial it is silly*".

Counsel objected to the foregoing italicized remark, and there followed this colloquy (227):

"**The Court**: Of course, you are asking about a very minor detail and a very slight irregularity.

Mr. Bond: I was predicating another question on this particular one.

The Court: What I am getting at, you are dealing with things that are very unimportant to find some deviation that probably is very important.

Q. Very well, your honor. Then I will ask this question. On other occasions you had gone to Detroit from Lansing, previous to that time, you had gone to O'Larry's bar, is that correct?

A. That is right".

There the matter dropped, and counsel did not move the court to strike out the remark or instruct the jury to disregard it.

Moreover, the court, in controlling cross-examination, did not abuse his discretion in sustaining the prosecutor's objection to this unimportant line of inquiry. The deviation in the testimony of this witness was trivial indeed.

There are further answers to the claim that this "curtailment of cross-examination" denied due process of law.

1. At the time the incident occurred, it will be noted (226-227), counsel's objection was directed to the remark of the prosecutor, and he did not contend that the court had unduly restricted his cross-examination, much less did counsel specially claim or set up any constitutional right.

In petitioner's motion (1067) for new trial, such claims were asserted only in a general way, and his 24th assignment of error (reason and ground of appeal) merely quoted (1165) the foregoing excerpt (226-227) from the record.

2. Moreover, this witness had been closely cross-examined by counsel for this petitioner (189-193), as well as by counsel for other defendants (193-199, 200-201, 201-225), and we respectfully submit the trial judge did not abuse his discretion in considering the subject exhausted.

Michigan courts leave the extent of cross-examination to the sound discretion of the trial judge,[16] and the federal courts of that district and circuit adhere to this rule,[17] though with one qualification peculiar to the courts of the United States.[18]

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[16]

People v. Higgins, 127 Mich. 291; People v. Vanderhoof, 234 Mich. 419; People v. Watson, 307 Mich. 596, cert. denied, 323 U.S. 749, rehearing denied, 323 U.S. 815.

[17]

James v. United States, 16 F. 2d 125; Banning v. United States, 130 F. 2d 330, certiorari denied, 317 U.S. 695.

[18]

Limiting scope of cross-examination on matters not involved in direct examination. Banning v. United States, supra; Cajiafas v. United States, 38 F. 2d 8.

We respectfully submit there is no substance to the first question raised by the petitioner.

2

Interrogation of juror.

On the third day of December, 1945, as the case neared its close, the court conducted an investigation in chambers with respect to the conduct of a member of the jury (876-882), the court stenographer being present at all times and reporting the entire interview.

Information had come to the court that one of the parties connected with the lawsuit may have had some contact with the juror; whereupon the juror proceeded somewhat loquaciously to narrate her experience which, when boiled down, amounted to this: One day, while driving into Pontiac, her car stalled, and she motioned to the car in back of her and the driver pushed her; when he came along she said to her companion: 'Oh, I think that is Pete Mahoney'; she thought the state police was in the car, in the back seat (876-877). Mahoney didn't say anything, and the juror didn't get a chance to thank him because he went so fast. Mike Selik and Mahoney were in the front seat. Not one word was said (877). She continued (878):

> "He didn't say anything, he just as he pushed me in, he says: 'Jesus, I hope nobody sees us', that is all he said".

It is apparent from his testimony (878) that she told other members of the jury about the incident.

The court informed the juror there was no state policeman in the car; the defendants were at liberty on bail (880).

He also wanted her to know that no one in the case had anything to do with the inquiry so she would not be wondering who in the case had been 'squealing to the judge', and she replied: 'In my mind, I thought, he has told Kennedy and trying to make something out of it' (881). And the court told her he wanted her to get that out of her mind.

We respectfully submit that such an inquiry, conducted in the presence of the court reporter, was both permissible and harmless. The court would, we think, have been derelict in his duty had he failed to investigate the matter. Nor has it been made to appear that prejudice to the defendant Mahoney resulted therefrom. There is no evidence to show that the juror felt unkindly toward Mahoney because of the incident. Why should she? The man had merely treated her with courtesy, and the court, in conducting his investigation, gave no indication that the conduct of Mahoney was subject to criticism.

Nor was this question raised in its federal constitutional aspect.[19] The petitioner's counsel in the court below averred (1071) in his 25th ground for new trial (motion, 1067-1073) "That the court erred in privately questioning two jurywomen relative to" the foregoing incident, and in his 22nd reason and ground for appeal (1165), he predicated error "because the defendants and appellants were prejudiced by the action of the court in interrogating a

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[19]

Although petitioner stated (1160) as his first assignment of error in the most general terms that the defendants had been denied their constitutional rights, he did not contend in his specific assignment on this particular point, that such a right or privilege was specially set up or claimed, 28 U.S.C., Revised, § 1257.

member of the jury etc.", but he did not claim that a constitutional right guaranteed by the Fourteenth Amendment had thereby been abrogated or infringed.

3

Supplemental charge to jury.

After the jury had deliberated for approximately 27 hours, and after hearing certain testimony read to them at their request, they were instructed as follows:

> "**The Court**: We have done the most we can to assist you in regard to your statement. If there are any others you should find necessary, you may request them the same as you have in this instance.
>
> "I think, however, in order that you may give each other respectful consideration, not implying you have not done so already, but I think I should give you at least a further instruction that may have some bearing on situations of this kind, which I have given on other occasions where jurors have difficulty in reconciling their differences as to testimony and I shall do so at this time.
>
> "The Court instructs the jury that the only mode provided by our Constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in

order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with with candor and with a proper regard and deference to the opinions of each other. You should consider that the case should at some time be decided; that you are selected in the same manner, and from the same sources, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this in view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the people to establish every part of it, beyond a reasonable doubt, and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust

the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

"Now, I ask you to remember the elements of the case as presented. Go over the testimony as may pertain to the various respondents in this case and try conscientiously and honestly in your own convictions and arrive at a verdict if you can conscientiously do so. You may retire".

Shortly thereafter, the jury returned their verdict (55, 1060) finding all the defendants guilty.

Petitioner claims that this instruction was coercive.

We contend that it was not.

We believe the general rule was well stated in 38 Cyc, page 1762.

"The Court may impress upon the jury the propriety and importance of coming to an agreement, and harmonizing their views, state the reasons therefor and tell them it is their duty to try to agree; but should not give instructions having a tendency to coerce the jury into agreeing on a verdict. While the court may reasonably urge an agreement, its discretion does not extend to the limit of coercion."

It is quite evident that the court has no right to tell the jury that it is their sworn duty to agree upon a verdict or that they must agree upon a verdict.

The court must not tell an individual juror to give up his own view and agree with the majority.

On the other hand, it is improper to instruct the juror that he should hold to his own view against the others and not listen to the opinions and arguments of other members of the jury with an open mind. It is the duty of the individual jurors to discuss the evidence and give their views as to the same and to deliberate upon such matters before arriving at a decision. (See *People v. Good,* 99 Mich. 620)

In *People v. DeMeaux,* 194 Mich. 18, after the jury had deliberated for a period of time and had been unable to arrive at a verdict, the court told them.

"It is your sworn duty to arrive at a verdict."

The Michigan court very properly reversed the conviction in that case because the instructions to the jury gave them a wrong view of the law and were definitely coercive. If the jury must, at all odds, render a verdict and some of the members could not conscientiously agree to the result, it would not be a unanimous verdict of all the jurors.

The court below, after stating the question presented as follows "in the briefs on this appeal", 322 Mich. 488, followed the opinion of the Court in *People v. Chivas,* 322 Mich. 384, decided the same day in a connected case based upon the same record though in a separate appeal. In *Chivas, supra,* 322 Mich. at 395, the Court, speaking of the supplemental charge to the jury, well said:

> "In our opinion the court did not tell the jury that it was their duty to agree upon a verdict or tell an individual juror that he must give up his own views and agree with the majority. The jury was instructed to deliberate upon the matters in issue with an open mind, giving due credit to the opinions of others. The jurors were also instructed that the verdict must be

the individual verdict of each juror and be the result of his own convictions. We are unable to find any coercion in the instructions given".

We cannot agree with counsel that consideration can properly be given to the affidavit of Juror Grogan (1085-1087), for, upon reading them, the cases cited do not support such a contention. It cannot be said that the affidavit in question was testimony "in denial or explanation of acts or declarations outside the jury room" or that it related "external causes tending to disturb the exercise of deliberate and unbiased judgment",[20] nor can it be said that the Grogan affidavit bore "upon the existence of an *extraneous* influence (the unsolicited, supplemental charge in question) that may have affected this jury's verdict" (petitioner's brief, p. 30).

4

Alleged improper remarks.

In relating this incident, counsel depart from the record somewhat, especially in his reference to the case of Hooper and the manner in which it was drawn into the record.

The State's witness Abramowitz was under severe cross-examination (484-486) by counsel for Fleisher-Selik, who

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[20]

Mattox v. United States, 146 U.S. 140, holding that in determining what may or may not be established by the testimony of jurors to set aside a verdict, public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow it; but evidence of an overt act, open to the knowledge of all the jurors, may be so received. See also Hyde v. United States, 225 U.S. 347, holding, last headnote, that "where the jury render a verdict within the issues, testimony of jurors themselves should not be received to show matters which essentially inhere in the verdict and necessarily can receive no corroboration". Such is the situation here.

endeavored to the best of his ability to bring the Hooper murder-conspiracy case before the jury. He had asked the witness whether after the 27th day of March 1945, when he was arrested, the witness was told by police officers that a picture of himself had been picked out by a Mrs. Iris Brown, the manager of a tavern in Albion, Michigan, and identified as looking like the man who was in her bar-room in Albion on the 11th day of January. The witness did not recall it, and counsel asked him: 'You certainly would remember that'? (485).

This remark of defense counsel was objected to by the prosecutor and a heated argument ensued during the course of which the prosecutor stated (486):

> "As a matter of fact, a Mrs. Brown picked out Pete Mahoney as being in that bar".

Counsel for Mahoney claimed this to have been fatal, and he contended that the court erred in denying his motion for a mistrial (527), urging that the remark of the prosecutor implied that Mahoney had been identified as the possible murderer of Senator Hooper.

1. We do not think the remark justified such an inference, or that the prosecutor intended so to imply. The court had consistently refused to allow either side to delve into the Hooper case, and we submit there was nothing in the remark itself that could lead anyone to believe that Mahoney had had the remotest connection with the Hooper murder.

2. The court at once, even before counsel could interpose his objection, instrued the jury to disregard the remark, and he ordered it stricken from the record (486); counsel for Mahoney seemed satisfied with such a ruling, and the conflict between counsel shifted to argument be-

tween Fleisher's attorney and the prosecutor (487). It was not until some time later (527) that Mahoney's counsel made his motion for mistrial.

We cannot accept counsel's claim that this was a denial of due process, and we respectfully submit that the inference which he draws, brief, pp. 37-41, are based largely on speculation.

As this Court have said:[21]

> ". . . 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.' ".

5

Claim that prosecutor "testified" when making certain remarks.

It appears from the opinion of the court below, 322 Mich. at 483, 34 N.W. 2d at 19, headnote 6-8, that the appellants urged three points relating to one Hyman Niskar and one Eisner: (1) that the prosecution should have endorsed the name of Niskar on the information as a *res gestae* witness, (2) that the court erred in denying motions for continuance until Niskar should be produced as such a witness, and (3) that the court abused discretion in denying motions to strike and for a mistrial because of alleged

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[21] Adams v. McCann, 317 U.S. 269, 281, quoted with approval, Buchalter v. New York, 319 U.S. 427, 431.

improper statements made by the proescutor relating to the witness Eisner.

The incident upon which the present claim of denial of due process rests, centers upon the latter phase of the question, and upon the prosecutor's remarks:

> "... prior to that day Mr. Eisner made certain claims about his automobile" (917); and again: "Prior to that date Mr. Martin Eisner claimed one thing—" (918).

Without going into details, reference to the record (917-919) will disclose, we respectfully submit, that the incident occurred during the prosecutor's re-direct examination (917-925) of the witness Lyle Morse. The question which started the argument (917) was this:

> "Q. ... I will ask you whether or not prior to the day you met Martin Eisner out here in the corridor on the occasion he talked to me, if prior to that time he had loaned his automobile to one of these defendants?"

There at once arose a heated discussion between counsel over the objections raised to this question (917-919), none of which need be repeated here. The question was never answered. The court expressed the opinion (920) that if the jury didn't get the alleged prejudicial effect of the question any better than he did, 'because in the confusion I didn't know what was transpiring'. Further:

> "**The Court**: In the matter you are just speaking of, I think you are attaching undue importance. I was listening to the question for the purpose of ascertaining the subject matter under consideration, and that

was when the name of Niskar was learned or when his being was first known to officers . . . or to the prosecution. That is what I was listening for, and probably because I was listening for that, I didn't hear some of the things you and Mr. Sigler said back and forth, but I am sure if the jury didn't hear more about it than I did, there would be no prejudice".

We agree with the trial court that counsel were making a mountain out of a mole hill.

And, we respectfully submit, it is still a mole hill.

6

Cumulative effect of specific instances of alleged impropriety.

Since counsel does not argue his sixth question, but merely states his position, brief, p. 48, we also refrain, contenting ourselves with reference to the penultimate paragraph of the opinion of the court below, 322 Mich. at 489-490, 34 N.W. 2d at 22, headnote 17, and more esp., the following:

"Impaneling of the jury in this case began October 23, 1945, and with some intermissions the trial continued and was concluded December 7th. The condensed record on appeal contains nearly 1200 pages. It is quite impossible in lengthy and vigorously contested trials of this character to attain absolute perfection. Mere irregularities which occur at various intervals during such trials do not justify reversal . . . In the instant case we hold appellants were not deprived of their constitutional rights of a fair trial and that the record abundantly supports their position".

VI

Conclusion

We, therefore, respectfully submit, on the several grounds asserted in this brief, that the petition for writ of certiorari to the Supreme Court of the State of Michigan should be denied.

Respectfully Submitted,

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